

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 20, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

VICTOR M. ROJAS-RIVERA,

Defendant.

NO: 2:22-CR-0093-TOR

ORDER DENYING MOTION TO
VACATE, SET ASIDE, OR CORRECT
SENTENCE UNDER 28 U.S.C. § 2255

BEFORE THE COURT is Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. ECF No. 56. The United States filed its Motion to Dismiss Defendant's Motion to Vacate, Set Aside, or Correct Sentence. ECF No. 60. Defendant has not filed a reply. The Court has reviewed the motion, the record, and files therein, and the United States' Motion to Dismiss, and is fully informed.

BACKGROUND

The Court will not recite all the facts in this case which are contained in the file and the Presentence Investigation Report. On June 14, 2023, Defendant

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SENTENCE UNDER 28 U.S.C. § 2255 ~ 1

1 pleaded guilty to Distribution of 50 Grams or more of Actual Methamphetamine in
2 violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). ECF Nos. 37, 39, and 59. At
3 the plea hearing, Defendant was placed under oath to tell the truth. ECF No. 59 at
4 2. Defendant was advised of the maximum penalty for the offense, not less than
5 ten years and up to life imprisonment, a term of supervised release of not less than
6 five years up to life, a fine of up to \$10 million, and a \$100 special penalty
7 assessment. *Id.* at 5. Additionally, Defendant acknowledged that he was waiving
8 his right to appeal his sentence if the Court imposed a sentence of 240 months of
9 incarceration or less. *Id.* at 6. Additionally, Defendant confirmed that he was
10 waiving his right to file any postconviction motion attacking his conviction and
11 sentence except one based on ineffective assistance of counsel arising from
12 information not then known by him or, in the exercise of due diligence, could be
13 known by him by the time the Court imposes sentence. *Id.* Defendant
14 acknowledged that no one made any promises to him to get him to plead guilty
15 other than the ones in the plea documents and that no one threatened him in any
16 way to get him to plead guilty. *Id.* at 4. Finally, Defendant acknowledged that the
17 Court may accept or reject the parties' recommendations, but that Defendant would
18 not be allowed to withdraw his guilty plea. *Id.*

1 On February 7, 2024, the Court sentenced Defendant to 235 months of
2 incarceration, five years of supervised release and a \$100 special penalty
3 assessment. ECF No. 54.

4 Defendant then filed his *pro se* Motion to Set Aside, or Correct Sentence
5 under 28 U.S.C. § 2255 on February 26, 2024. ECF No. 56.

6 DISCUSSION

7 The Court finds that the issues raised do not require an evidentiary hearing. See
8 Rule 8, Rules—Section 2255 Proceedings. The transcripts, records and materials
9 filed in this proceeding adequately document the issues for resolution.

10 A. Motion to Vacate, Set Aside or Correct Sentence

11 The Court first considers Defendant’s motion pursuant to Rule 4 of the
12 Rules Governing Section 2255 Proceedings. Rule 4 provides that the Court “must
13 promptly examine [the motion]. If it plainly appears . . . that the moving party is
14 not entitled to relief, the judge must dismiss the motion . . .”

15 A defendant in criminal proceedings has a constitutional right to effective
16 assistance of counsel. U.S. Const. amend. VI. A convicted defendant asserting
17 violation of his constitutional right to effective assistance of counsel must
18 demonstrate the following: (1) “that counsel’s representation fell below an
19 objective standard of reasonableness,” and (2) “that there exists a reasonable
20 probability that, but for counsel’s unprofessional errors, the result of the

1 proceeding would have been different.” *Kimmelman v. Morrison*, 477 U.S. 365,
2 374, 375 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).
3 To satisfy this standard, a defendant must show that counsel’s representation was
4 “outside the wide range of professionally competent assistance” and that there is a
5 “probability sufficient to undermine confidence in the outcome.” *Hart v. Gomez*,
6 174 F.3d 1067, 1069 (9th Cir. 1999). “Judicial scrutiny of counsel’s performance
7 must be highly deferential.” *Strickland*, 466 at 689.

8 Defendant moves the Court to set aside or correct his sentence based on
9 claims of ineffective assistance of counsel.

10 Here, Defendant is plainly not entitled to relief.

11 **B. Waiver of Rights to Appeal and File Any Post-Conviction Motion**

12 This Court finds Defendant waived his right to file the instant motion.
13 Defendant expressly waived his right to file any post-conviction motion attacking
14 his conviction and sentence, including a motion pursuant to 28 U.S.C. § 2255,
15 except one based upon ineffective assistance of counsel based on information not
16 then known by Defendant and which, in the exercise of due diligence, could not be
17 known by Defendant by the time the Court imposes the sentence. The Court
18 specifically informed Petitioner of this waiver provision at the time of his plea and
19 he acknowledged he understood it. *See* Fed. R. Crim. P. 11(b)(1)(N).

1 Defendant bases his motion on a claim of ineffective assistance of counsel
2 based on a promise or expectation that his counsel said he would receive a 60-
3 month sentence, or an 87-month sentence or a 120-month sentence. *See* ECF No.
4 56.

5 A defendant's waiver of his rights to appeal and to bring a collateral attack is
6 generally enforced if "(1) the language of the waiver encompasses his right to
7 appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily
8 made." *Davies v. Benov*, 856 F.3d 1243, 1246 (9th Cir. 2017) (citation omitted).
9 The exception to waiver contained in his plea agreement only includes motions
10 based upon ineffective counsel "based on information *not now known by*
11 *Defendant and which, in the exercise of due diligence, Defendant could not know*
12 *by the time* the Court imposes the sentence." ECF No. 37 at ¶ 17 (emphasis
13 added).

14 Defendant acknowledged to the Court, under oath, that no promises other
15 than the ones in the plea agreement were made to him. Defendant's argument is
16 therefore meaningless in light of his sworn statement at the change of plea hearing.

17 **C. Complaint that Defendant is Entitled to a 3-Point Reduction**

18 Defendant also complains that he is an undocumented person in this country
19 and that he qualifies "for a 3 point downward reduction on my level of offense that
20 was never awarded". ECF No. 56 at 4. The United States Sentencing Guidelines

1 Manual does not award a 3 point reduction to illegal aliens committing drug
2 offenses. This request is denied.

3 **D. Certificate of Appealability**

4 A petitioner seeking post-conviction relief may appeal a district court's
5 dismissal of the court's final order in a proceeding under 28 U.S.C. § 2255 only
6 after obtaining a certificate of appealability ("COA") from a district or circuit
7 judge. 28 U.S.C. § 2253(c)(1)(B). A COA may issue only where the applicant has
8 made "a substantial showing of the denial of a constitutional right." *See id.*
9 § 2253(c)(2). To satisfy this standard, the applicant must "show that reasonable
10 jurists could debate whether (or, for that matter, agree that) the petition should
11 have been resolved in a different manner or that the issues presented were adequate
12 to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S.
13 322, 336 (2003) (internal quotation marks and citation omitted).

14 The Court concludes that Defendant is not entitled to a COA because he has
15 not demonstrated that jurists of reason could disagree with this Court's resolution
16 or conclude the issues presented deserve encouragement to proceed further.

17 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 18 1. Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28
19 U.S.C. § 2255 (ECF No. 56) is **DENIED**.

2. The Court further certifies that there is no basis upon which to issue a certificate of appealability and the same is **DENIED**. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

The District Court Executive is hereby directed to enter this Order and furnish copies to the parties, including:

Victor M. Rojas-Rivera,
Fed. Reg. No. 18372-510
FCI LOMPOC II
FEDERAL CORRECTIONAL INSTITUTION
3901 KLEIN BLVD
LOMPOC, CA 93436

This file and the corresponding civil file (2:24-CV-0065-TOR) shall be **CLOSED**. A **Judgment** shall be filed in each file which denies the Motion to Vacate under 28 U.S.C. § 2255.

DATED August 20, 2024.



A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge